IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.278 OF 2007

The Commissioner of Income Tax,)
Aayakar Bhavan, Near Holi Cross)
High School, Cantonment,)
Aurangabad.)..Appellant.

V/s.

Terna Shetkari Sahakari Sakhar)
Karkhana Ltd. Dhoki, Tal. & Dist.)
Osmanabad.)..Respondent.

Mr.B.M.Chatterji, Advocate with Mrs.P.P.Bhosale for the appellant.

Mr.S.N.Inamdar, Advocate with Mr.A.K.Jasani for respondent.

CORAM : F.I.REBELLO AND J.P.DEVADHAR, JJ.

JUDGMENT RESERVED ON : 8TH OCTOBER, 2007.

JUDGMENT PRONOUNCED ON : 22ND OCTOBER, 2007.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. This appeal is filed by the Commissioner of Income Tax, Aurangabad under section 260A of the Income Tax Act, 1961 against the order passed by the I.T.A.T., Pune, Bench-A, Pune bearing ITA No.256/PN/05 dated 17/2/2006 for AY 1992-93.

2. Although several questions are raised in the appeal, the appeal is admitted on the following

reframed questions of law and the appeal is taken up for final hearing by consent of both the parties:-

1. Whether the Appellate Tribunal was right in law in holding that provisions of Section 40A(2) (a) are not applicable to a co-operative Society ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the additional payment over and above the statutory minimum price (SMP) was cane price and not diversion of profit and as such allowable as business expenditure under section 37(1) of the Income Tax Act, 1961 ?

3. Whether on the facts and in the circumstances of the case cane price / Khodki charges paid by the assessee was not "Bonus" within the meaning of 2(4) of the Maharashtra Co-op. Societies Act, 1960 and it was allowable as business expenditure ?

4. Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in deleting the addition of Rs.59,047/- made on account of sugar supplied to members at concessional rate ?

5. Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in allowing the expenditure of Rs.14,25,008/- and Rs.2,07,038/- incurred by the society towards binding material charges paid to members and non members respectively holding that the said expenditure was incurred as a matter of business expediency of the assessee society and it forms part of transportation charges ?

3. As regards the first three questions are concerned, counsel on both sides agree that the aforesaid questions are answered by this Court in Income Tax Appeal No.318 of 2007 (The Commissioner of

Income-tax, Aurangabad V/s. Manjara Shetkari Sahakari Sakhar Karkhana Ltd., Latur) dated 14th August, 2007 in favour of the assessee and against the revenue.

4. As regards question No.4 is concerned,, learned counsel for the revenue states that in view of the C.B.D.T. Circular No.117 dated 22/8/1973, he is not pressing the fourth question. Hence the only question to be decided in this appeal is question No.5.

5. The facts relevant for deciding the 5th question are that the respondent (‘assessee’ for short) is engaged in the manufacture of sugar. Sugarcane is the raw material required for manufacture of sugar and the same is purchased by the assessee from its members as well as non members.

6. Sugar being a controlled commodity, minimum price payable to the sugarcane growers by the producer of sugar like the assessee is fixed by the Central Government under the Sugarcane (Control) Order, 1966 as modified from time to time.

7. Clause 3A of the Sugarcane (Control) Order, 1966 as modified by Sugarcane (Control) Amendment Order, 1983 to the extent relevant herein reads as under:-

3A. REBATE THAT CAN BE DEDUCTED FROM THE PRICE PAID FOR SUGARCANE

" A producer of sugar or his agent shall pay, for the sugarcane purchased by him, to the sugarcane grower or the sugarcane growers' co-operative society, either the minimum price of sugarcane fixed under clause 3, or the price agreed to between the producer or his agent and the sugarcane grower or the sugarcane growers' co-operative society, as the same may be (hereinafter referred to as the agreed price) ;

Provided that -

(i) .....

(ii) .....

(iii) where the sugarcane is brought bound in bundles and weighed as such, the Central Government or with the approval of the Central Government, the State Government, or the Director of Agriculture, or the Cane Commissioner, or the District Magistrate, within their respective jurisdiction may allow a suitable rebate in regard to the weight of the binding material not exceeding 1000 kilograms per quintal of sugarcane; and

(iv) The Central Government, or the State Government, or the Director of Agriculture, or the Cane Commissioner, or the District Magistrate, may allow a suitable rebate in the minimum price or the agreed price as the case may be, when the cane is supplied within their respective jurisdiction subject to the conditions that the rebate so allowed shall not exceed the estimate expenditure on harvesting. "

8. Thus, under the sugarcane (Control) order, the sugar factories are allowed to deduct from the

sugarcane price rebate towards the binding material not exceeding 1 kg. per quintal of sugarcane i.e. 0.01% if the sugarcane is brought bound in bundles. It is the case of the assessee that most of the time sugarcane is brought to the factory in bullock carts / tractors - trailors in unbound condition, that is without using any binding material. However, few farmers bring the sugarcane to the factories bound in bundles. The sugar factories prefer to pay the cane price to such farmers on the gross weight without deducting the costs of binding material at 0.01% permitted under the Sugarcane Control order.

9. In the assessment year in question the assessing officer was of the opinion that the assessee was bound to deduct 0.01% from the total sugarcane price towards the cost of the binding material as per the Sugarcane Control Order and since the assessee failed to deduct any amount towards the binding material, the assessing officer estimated the cost of the binding materials at 0.01% and disallowed the same. However, the assessing officer disallowed a sum of Rs.14,25,008/- towards cost of the binding material supplied by the members under section 40A (2) (a) of the Income Tax Act, 1961 and disallowed a sum of Rs.2,07,038/- towards the cost of binding materials supplied by the non members under section 37 of the Income Tax Act, 1961.

10. On appeal filed by the assessee, the Commissioner of Income Tax (A) deleted the additions made by the assessing officer, by relying upon the Special Bench decision in the case of Manjara Shetkari Sahakari Sakhar Karkhana Ltd.

11. On appeal filed by the revenue, the I.T.A.T. Pune Bench, Pune dismissed the appeal filed by the revenue and upheld the order of C.I.T.(A). Hence this appeal is filed by the revenue under section 260A of the Income Tax Act, 1961.

12. Mr.Chatterji, learned counsel appearing on behalf of the revenue submitted that the direction given by the Central Government to deduct 0.01% from the sugarcane price towards the cost of binding materials was mandatory and since the assessee had failed to deduct the said amount, the assessing officer was justified in making disallowance of the said amount. He submitted that irrespective of the fact that the binding material could be used as a fuel, the directions given by the Central Government regarding binding material was binding on the assessee and as the assessee failed to deduct the cost of the binding material, the assessing officer was justified in making the disallowance to that extent. He submitted that it is not open to the

assessee to contend on the one hand that the directions given by the Government regarding the payment of sugarcane price is binding on them and at the same time refuse to follow the directions regarding the deduction of the cost of the binding materials from the total sugarcane price payable to the members and non members. Mr.Chatterji further submitted that the excess payment made to members and non members in contravention of the Sugarcane (Control) Order, apart from being contrary to law amounts to distribution of profits which is not permissible in law. Accordingly, Mr.Chatterji submitted that the Commissioner of Income Tax (A) as well as the Tribunal were not justified in deleting the additions made by the assessing officer.

13. Mr.Inamdar, learned counsel appearing on behalf of the respondent while supporting the order of the Tribunal submitted that the deduction towards binding charges contained in the Sugarcane (Control) Order was not mandatory but directory. He submitted that the decision of the assessee not to deduct the weight of the binding material was based on business expediency. He submitted that what was paid was not a separate expenditure as such but it was payment of cane price only. He submitted that the additions made by the assessing officer by making disallowance under Section 40A(2) of the Income Tax Act, 1960 cannot be sustained

in view of the decision of this Court in the case of CIT, Aurangabad V/s. Manjara SSK Limited (I.T.A. No.318 of 2007) decided on 14th August, 2007. Similarly, the disallowance made under section 37 of the Act cannot be sustained as the total sugarcane price has been paid as per the State Advice Price (SAP) fixed by the State Government. Accordingly, Mr.Inamdar submitted that there is no merit in the appeal filed by the revenue and the same is liable to be dismissed.

14. We have carefully considered the rival submissions.

15. At the outset, it may be noted that the object of Sugarcane (Control) Order is to ensure that the sugarcane growers gets the minimum price for the sugarcane grown by them. The said order inter alia empowers the Central Government or other authorities named therein to allow rebate from the minimum price not exceeding 0.01% towards the cost of the binding material. According to the revenue, the directions given in the Sugarcane (Control) Order to deduct the cost of the binding materials @ 0.01% of the total sugarcane price is mandatory, whereas, according to the assessee it is directory.

16. On a plain reading of clause 3A of the

Sugarcane (Control) Order, it is seen that the directions contained therein are directory and not mandatory. The use of the word 'may' in clause 3A(iii) of the Sugarcane (Control) Order clearly shows that the direction contained therein is directory and not mandatory. Moreover, neither the Central Government nor the State Government nor any other authorities in exercise of the powers conferred under clause 3A of the Sugarcane (Control) Order had directed the assessee to deduct 0.01% from the total sugarcane price towards the cost of the binding materials. In these circumstances, it is difficult to accept the argument of the revenue, that deduction of 0.01% from the total sugarcane price towards the cost of the binding materials was mandatory. Consequently, disallowance made on the footing that excess cane price has been given to the members and non members in contravention of the mandatory provisions contained in the Sugarcane (Control) Order cannot be sustained.

17. Moreover, in the present case, the addition of Rs.14,25,008/- towards the cost of binding materials is made by the assessing officer by making disallowance from the sugarcane price payable to the members of assessee, under Section 40A(2) of the Income Tax Act. This Court in the case of Manjara SSK Limited (Supra) has held that Section 40A(2) of the Income Tax

Act is not applicable to a cooperative society. Therefore, the deletion of the addition of Rs.14,25,008/- could not be made by making disallowance under section 40A(2) in the case of the assessee cooperative society.

18. As regards the deletion of the addition of Rs.2,07,038/- is concerned, in the present case, the assessee has paid to the non-members the sugarcane price as per the State Advise Price (SAP) fixed by the State Government. As held by this Court in the case of Manjara SSK Ltd. (supra) the SAP fixed by the State Government is binding on the assessee. The State Advise Price fixed by the State Government does not contain any direction to deduct the cost of the binding materials from the SAP. It is not in dispute that the assessee has made payments to the members and non members as per the SAP fixed by the State Government. Therefore, in the facts of the present case, it cannot be said that the payments made to the members and non members was in excess of the Sugarcane (Control) Order and consequently making disallowance / addition on that ground does not arise at all.

19. The 5th question raised by the revenue is, therefore, answered in the affirmative, that is in favour of the assessee and against the revenue.

20. The appeal is dismissed accordingly, with no order as to costs.

(F.I.REBELLO, J.)

(J.P.DEVADHAR, J.)